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No. 91-119 (7)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

AMICUS CURIAE BRIEF OF THE CITY OF NEW YORK IN SUPPORT OF WISCONSIN DEPARTMENT OF REVENUE

O. PETER SHERWOOD,
Corporation Counsel of the
City of New York,
100 Church Street,
New York, New York 10007.
(212) 788-0842 or 0835.

EDWARD F. X. HART, *
FRANCES J. HENN,
STANLEY BUCHSBAUM,
of Counsel.

November 21, 1991.

*Counsel of Record.

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BRIEF OF AMICUS CURIAE CITY OF NEW YORK

Interest of the Amicus Curiae

Pursuant to Rule 37.5, the City of New York, as a political subdivision of the State of New York, is exercising the right to file a brief amicus curiae in support of the position of the Wisconsin Department of Revenue.

The City's interest in the case stems from the fact that similar questions of tax liability arise under tax laws which it imposes. The City imposes a tax based on the net income of a corporation. N.Y.C. Administrative Code, Title 11, ch. 6, subch.2. The State of New York authorized the imposition of this City tax. N.Y. Laws 1966, ch. 722. The City also imposes an unincorporated business net income tax. N.Y.C. Admin. Code, Title 11, Ch. 5. This also was authorized by New York Laws of 1966, chapter 772.

Facts Relied on

We adopt the statement of relevant facts as stated in the opinion of the Wisconsin Supreme Court. Wrigley v. Dept. of Rev., 160 Wis. 2d 53, 465 N.W.2d 800 (1991). We rely also on those facts as more fully developed in the opinion of Wisconsin's intermediate appellate court, the Court of

Appeals. 53 Wis.2d 559, 451 N.W.2d 444 (1989).

ARGUMENT

A PROPERLY APPORTIONED NON-DISCRIMINATORY INCOME TAX MAY BE IMPOSED BY A STATE OR CITY IN WHICH TANGIBLE PERSONAL PROPERTY IS SOLD BY DELIVERY ACROSS INTERSTATE BOUNDARIES, WHERE THE ACTIVITIES OF THE VENDOR IN THAT STATE OR CITY GO BEYOND MERE SOLICITATION OF ORDERS.

a. The federal law and its background

(1)

Public Law 86-272, codified in 15 U.S.C. 381, was enacted in 1959. In effect, it bars a State or a political subdivision thereof from imposing a net income tax on income derived in the State by any person from interstate commerce "if the only business activities" within the State are either: (1) "the solicitation of orders" for sales of tangible personal property with the orders sent outside the State "for approval

or rejection" and with the approved order "filled by shipment or delivery" from a point outside the State, or

(2) the solicitation of orders in the name of or for the benefit of a prospective customer of such person if the orders when filled are in accordance with the requirements of paragraph (1).

Thus, the bar against imposition of a net income tax applies "only" when all that occurs in the State is "solicitation" with orders accepted or rejected outside the State and with delivery of the goods ordered, shipped or delivered from outside the State. The law narrowly confines the prohibition, and its history shows a clear intent to so confine it.

(2)

The language limiting the prohibition in the statute is clear and unambiguous. This makes it unnecessary to consider the

background or history leading to its enactment. We shall, however, review it to show that an extremely narrow restriction was intended.

In Northwestern Cement Co. v. Minnesota, 358 U.S. 450 (1959), this Court upheld income taxes imposed by two States on net income from exclusively interstate operations of foreign corporations. In one State the taxed corporation engaged in a regular and systematic course of solicitation with the orders being subject to acceptance, filling and delivery from its plant outside the taxing State. In the taxing State it leased an office, equipped with its own furniture and fixtures, which was used by one salesman, another salesman, who was a district manager, and a secretary. Two additional salesmen used the office as a clearing house. Two cars were furnished to these salesmen. The salesmen also received

and transmitted to their employer claims for loss or damage in any shipments.

In the other State the vendor had salesmen, who carried on the usual sales activities, including regular solicitation, receipt and forwarding of orders, as well as promoting the business and good will of the vendor. It also had an office for one salesman and a full-time secretary. Other than office equipment, supplies or advertising literature and the like, the vendor had no property in the State. All orders were subject to approval by the out of state home office and were shipped from there on an "f.o.b. warehouse basis."

In the first paragraph of this Court's opinion, the Court said (358 U.S. at 452):

> "We conclude that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming

sufficient nexus to support the same."

In Brown-Forman Distill. Corp. v. Collector of Revenues, 234 La. 651, 101 So.2d 70 (1958), a Kentucky distilling corporation was held subject to a Louisiana income tax on its income from that State. The distiller's activities in Louisiana consisted of having "missionary men", who called on wholesale dealers and who, on occasion, accompanied salesmen of these wholesalers to assist them in obtaining orders from retail dealers. An appeal was taken to this Court. It was dismissed and, treating it as a petition for certiorari, the petition was denied. Brown-Forman v. Collector of Revenue, 359 U.S. 28 (1959).

In light of the decisions in the Northwestern case, the sentence in the opinion which we have quoted, and the refusal of this Court to review the Louisiana case, businesses began to fear that the long

established rule that a tax could not be imposed simply because drummers or salesmen came into the taxing state was about to be overruled. They lobbied Congress for a law designed to prevent that from happening. As a result, Public Law 86-272 was enacted.

(3)

The Senate Report on the bill which was enacted and the Conference Report on it prepared by managers on the part of the House of Representatives are more readily found in the 1959, Volume 2, of the United States Code Congressional and Administrative News at pages 2548 to 2561.

The Senate Report, at the outset, states that the bill is designed to deal with the problem arising by reason of the Northwestern case, and it also refers to the refusal to review the Brown-Furman case in Louisiana. It pointed out that businesses

were afraid that "mere solicitation of orders [would] be regarded as a local activity forming a sufficient 'nexus' with the State" to permit the imposition of taxes (p.2551).

The Report made it clear that the bill was designed to prevent mere solicitation from becoming the sole basis for imposing the tax. In its "DETAILED DESCRIPTION OF COMMITTEE'S BILL", it repeats, at least four times, that the exemption or immunity from the tax applies "only" or "merely" where all that is done in the State is solicitation (pp. 2552, 2553, 2554). The bill, however, treats a sales office in the State of the sale as a part of solicitation (p. 2553). It states that the immunity granted will not be available if the business activities by salesmen are not limited to the solicitation of orders, and it goes on to note that it will not be available "where the orders are filled by a shipment or delivery from a stock of

goods, warehouse, plant, or factory maintained by the person within the State (p. 2553).

(4)

The short conference report prepare by managers for the House of Representatives also emphasizes that the bill is designed to give immunity "where the only business activity within the State by the out-of-State company was solicitation" (p.2560).

(5)

The use of the word "only" to describe the solicitation which will grant immunity in the statute enacted, therefore, follows the intent of the drafters of the bill.

b. **The claimed "de minimis" extension of the immunity.**

The vendor concedes that its activities in Wisconsin were not "only" the solicitation of orders, but urges that the additional activities were "de minimis" or trifles. It cannot be denied that every rule of law and

every statute may be subject to a "de minimis" exception. Where, however, the statute provides immunity if the "only" activity is solicitation, a de minimis exception would apply solely to the most inconsequential activity. The extreme limit of what would be regarded as inconsequential is indicated not only by the language of the statute, but by the intent of its drafters.

It should be noted that the statute specifies certain exceptions to the mere solicitation limitation. Thus, neither the use of an independent contractor to make sales nor the maintenance of an office used solely for making sales or soliciting orders is to be treated as removing the exemption [15 U.S.C. §381(c)]. Specifying these activities and mentioning no others indicates how very slight any possible de minimis exception would have to be. This is also shown by the requirement that, in addition to mere

solicitation, the "orders are [to be] sent outside the State for approval or rejection" and must be "filled by shipment or delivery from a point outside the State" [15 U.S.C. §381 (a)(1)].

The drafters indicated that conduct going beyond solicitation would not be protected by the immunity being granted. They stated that it "will not be available to a person, however, if the business activities by salesmen within the State" are not limited to the "solicitation" of orders (p. 2553). It was noted that, while the immunity would extend to the use of a sales office, it would not be available if its primary purpose and use were other than for sales purposes (pp. 2553-2554). The Report repeatedly states that the exemption applies only where the sole activity in the State is solicitation or the use of an independent contractor or sales office, but it goes on to state that

whether any other activity constitutes a basis for imposing the tax is left "for future determination by the Congress, or in the absence of congressional action, by the courts" (p. 2554).

The Wisconsin Supreme Court, in part, escaped "de minimis" by ruling that any activity incidental to or inextricably bound to solicitation was to be treated as solicitation; still other activities were treated as de minimis (465 N.W.2d at 811). The definition of solicitation ascribed by the Wisconsin Court flies in the face of the terms of the statute. If the intent had been to treat activities incidental or inextricably bound to solicitation as being covered by that term, it would be inconsistent with the explicit statement that, for the exemption to apply, the orders must be sent out of the State for approval or rejection and that they must be filled by shipment or delivery from

a point outside the State. Both such matters are incidental to or inextricably bound to solicitation. Where matters relating to solicitation were to be given the exemption, the law specifically so provided, as in the case of independent contractors or sales offices.

Even if, despite all of the indications of the limited nature of the exemptions, de minimis could be applied, it could reasonably be used only where the exception was extremely minimal. Moreover, where there are a number of activities which, if treated individually, might be regarded as de minimis, the aggregation of these activities falls in a different category. Otherwise the "only" restriction in the statute limiting it to solicitation would become meaningless.

Here we have the following activities which have been treated as either an element

of solicitation or as de minimis by the Court below:

> Replacement of stale gum by stock in the hands of the salesmen;
>
> Sales of gum and its immediate transfer to fill racks when making "agency stock checks;"
>
> Regular and periodic training seminars held in Wisconsin;
>
> Maintaining product displays both as to location and design;
>
> Recommending hiring, firing and raises by a regional manager in Wisconsin;
>
> Involvement in credit transactions by regional manager;
>
> and the rental of some storage space in Wisconsin for several months to store a representative's car and supplies (each representative carried a supply of gum with a wholesale value of approximately $1000).

These activities in Wisconsin exceeding mere solicitation, especially when taken together, cannot be disregarded as de minimis or trifling under a law which limits the exemption to those whose sole activity in

the State is "only" solicitation. The limited nature of the exemption does not have to rest on any canon of statutory construction. It is called for by the terms of the statute and the clear intention shown by its history.

There is no sound basis for treating the listed activities as simply "solicitation." Since the sole aim of a vendor of tangible goods is to sell those goods, any activity in the selling state, no matter how extensive, could, under such an interpretation, be deemed merely an element of solicitation.

The only relevant definition of "solicit" in Webster's Third New International Dictionary reads as follows:

> "to make petition to: ENTREAT, IMPORTUNE (to the king for relief): esp: to approach with a request or plea (as in selling or begging) **."

The statute itself, especially when read in light of its history, makes clear that the

term "solicitation" was not intended to be so broadly interpreted.

c. **Additional reasons showing that the immunity provision does not apply.**

(1)

Although Heublein, Inc. v. South Carolina Tax Comm'n, 409 U.S. 275 (1972), the only case decided by this Court involving Public Law 86-272, involves a somewhat different issue, the opinion emphasizes the limited nature of the exemption from State tax which the statute provides. The Court pointed out, quoting from an earlier case, that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance." (pp. 281-282)

(2)

To treat the exemption as extending to any activity which advances or assists in the sale of goods would not only expand the

narrow limits of the law, but would go far beyond the stated intent of the drafters. Instead of preventing an interstate seller from being disadvantaged, it would give him a tremendous advantage over a local manufacturer or wholesale vendor. The interstate vendor would escape the income tax placed on local industry even though he went beyond mere salesmanship in the State and acted, so far as customers are concerned, as though all activities relating to them were the same as those of local sellers.

(3)

The case of Gillette Co. v. Tax Comm., 56 AD2d 475 (1977), affd., 45 NY2d 846 (1978), is in no way inconsistent with our position. In that case the vendor had no property in New York other than salesmen's samples. The ground on which the tax was imposed was the vendor's efforts to induce

sales by advising retailers (who do not buy directly from Gillette Co. but from wholesalers who buy from them) with regard to "display techniques" (56 AD 2d at pp. 481-482). The New York court concluded that "some sort of calls upon direct accounts was expressly anticipated and condoned by the statute" (ibid.).

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED.

Respectfully submitted,

O. PETER SHERWOOD,
Corporation Counsel of
the City of New York,
Attorney for Amicus Curiae
City of New York.

Edward F. X. Hart,*
Frances J. Henn,
Stanley Buchsbaum,
of Counsel.

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* Counsel of record.